81478-3

No. 81478-3, consolidated with Nos. 81480-5, 81481-3, 81759-6, 81758-8

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, ET AL,

Petitioners,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

THE DEPARTMENT OF LABOR & INDUSTRIES' ANSWER TO AMICI NJP, ACLU, & WITS

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I. INTRODUCTION

The Department of Labor & Industries agrees with amici Northwest Justice Project (NJP), American Civil Liberties Union (ACLU), and Washington State Court Interpreters & Translators Society (WITS) that RCW 2.43 is intended to secure limited English proficient (LEP) persons' rights in legal proceedings and that the statute must thus be read in light of the claimants' interests in a due process hearing. NJP 7; ACLU/WITS 2, 19; *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999) ("The purpose of RCW 2.43 is to uphold the constitutional rights of non-English-speaking persons."). The amici also correctly recognize that the hearing before the Board of Industrial Insurance Appeals is the "legal proceeding" subject to the interpreter requirements and that a remand is the only appropriate remedy for a failure to provide interpreter services required by the statute.[1]

However, the amici are incorrect in suggesting that the drastic remedy of automatic reversal may apply. Automatic reversal is a narrow exception to the general rule that an appellant must show prejudice. Prejudice is required for a statutory or constitutional error because "remedies should be tailored to the injury suffered" and "should not

[1] The ACLU/WITS brief only addresses Board hearings although it inadvertently refers to "the Department." In context, it is clear they mean "the Board" throughout their brief.

unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981) (violation of the right to counsel may be harmless). Automatic reversal arises only where assessment of prejudice is impossible, such as *total* denial of right to counsel or a biased judge. Here, the prejudicial effect of alleged inadequacy in interpreter services during Board hearings can be assessed by examining the record made at the hearings or on appeal. *See* RCW 51.52.115 (superior court may take testimony on "alleged irregularities in procedure before the board"). The claimants have had an opportunity to show how any alleged error during their hearings could have made a difference in the outcome, but they (and amici) show no prejudice.

Further, the amici incorrectly suggest that the claimants have an absolute right to a publicly-funded interpreter for all aspects of the hearings, such as hearing preparation with counsel. They do not. *See In re Grove*, 127 Wn.2d 221, 238, 897 P.2d 1252 (1995) (there is "no constitutional right to counsel afforded indigents involved in worker compensation appeals"); RCW 2.43.040(3) (non-indigent LEP persons are responsible for interpreter costs in a legal proceeding not initiated by government). The statute is not intended to create or change other rights or duties. RCW 2.43.010 ("Nothing in [the statute] abridges the parties' rights or obligations under other statutes or court rules or other law.").

The statute requires interpreters for the claimants to testify and understand the hearings. An industrial appeals judge (IAJ) need not authorize interpretation services as if it was a criminal case, where such services implement a right to counsel.

II. ARGUMENT

A. An Appellant Claiming Inadequate Interpreter Services under Due Process or RCW 2.43 Must Show a Prejudicial Error

The amici urge an automatic reversal rule based on a failure to provide interpreter services under RCW 2.43. NJP asks this Court to adopt a "bright line rule" requiring reversal for a failure to provide interpretation for any witness testimony or for "significant or critical portions of a legal proceeding." NJP 2. ACLU/WITS argue that failure to provide full interpretation required by the statute is per se prejudicial. ACLU/WITS 17-19. Both precedent and sound policy require a party claiming inadequate interpreter services to show both an erroneous denial of interpretation and prejudice to justify a remand.

1. The prejudice requirement generally applies in criminal and civil cases for a constitutional or other error

Courts generally disregard a non-prejudicial error in criminal and civil cases. *See* RCW 4.36.240 (court "shall, in every stage of an action" disregard any error or defect that does not "affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason

of such error or defect"); *State v. Storhoff*, 133 Wn.2d 523, 532, 946 P.2d 783 (1997) (absent "actual prejudice," incorrect DOL notice of a driver's license revocation does not require relief); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005) (for a due process violation, "the party must be prejudiced"); *United States v. Mendoza-Lopez*, 7 F.3d 1483, 1485 (10th Cir. 1993) ("fundamental unfairness sufficient to constitute a violation of due process" requires "prejudice from the alleged unfairness"), *cert denied*, 511 U.S. 1036 (1994).

Contrary to NJP's argument at 14-15, the Administrative Procedures Act expressly requires substantial prejudice for relief based on a claim that an agency fails to follow a prescribed procedure. *See* RCW 34.05.570(1)(d); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 226, 173 P.3d 885 (2007) (relief may not be granted unless a party shows both a basis for review under .570(3) and prejudice under .570(1)(d)).[2]

Even a violation of a constitutional right in a criminal case is generally subject to the harmless error analysis. *See Arizona v.*

[2] NJP relies on *Mills v. W. Wash. Univ.*, 150 Wn. App. 260, 208 P.3d 13 (2009) and *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 129 P.3d 838 (2006). NJP 15. *Seattle Area Plumbers* did not specifically address prejudice, and prejudice was apparent in its discussion. *See Seattle Area Plumbers*, 131 Wn. App. at 873-75 (council allowed apprenticeship expansion sponsor to present evidence on the issue of need while precluding the objectors from presenting evidence on that issue, when the objectors had to show the expansion was not necessary). To the extent *Mills* holds that every basis for relief under subsection 570(3) is per se prejudicial under 570(1)(d), it is incorrect and inconsistent with this Court's interpretation of the statute in *Densley*.

Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("constitutional error [generally] does not automatically require reversal of a conviction" because "most constitutional errors can be harmless"). As the central purpose of a trial is to decide ultimate facts, requiring prejudice "promotes public respect" for the process "by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Fulminante*, 499 U.S. at 308 (citation omitted); *In re Hinton*, 152 Wn.2d 853, 858, 100 P.3d 801 (2004) (prejudice rule serves "the interest of finality, economy, and integrity of the trial process").

Finally, the prejudice requirement does not turn on whether the error involves a right said to be "fundamental," such as the Sixth Amendment right to counsel, confrontation, or presence. *See Morrison*, 449 U.S. at 365 ("In addition, certain violations of the right to counsel may be disregarded as harmless error."); *City of Spokane v. Kruger*, 116 Wn.2d 135, 145-46, 803 P.2d 305 (1991) ("It is simply not true that irreparable prejudice must inevitably flow from a denial of counsel."); *United States v. Owen*, 407 F.3d 222, 226-28 (4th Cir. 2005) (denial of right to counsel at arraignment harmless "where the arraignment involved no necessary or inevitable impact on the subsequent criminal proceedings" and thus "was not 'structural error'"); *Ditch v. Grace*, 479 F.3d 249, 255-56 (3d Cir. 2007) (harmless error analysis applies where it is not shown

"that the denial of counsel at the preliminary hearing necessarily undermined the entire criminal proceeding"); *Delaware v. Van Arsdall*, 475 U.S. 673, 681-84, 106 S. Ct. 1471, 89 L. Ed. 2d 674 (1986) (harmless error rule applies to a violation of the confrontation clause); *State v. Hieb*, 107 Wn.2d 97, 108, 727 P.2d 239 (1986) ("A confrontation clause violation may constitute harmless error."); *Rushen v. Spain*, 464 U.S. 114, 117-18, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (harmless error rule applies to the accused's right to be present at all critical stages of the trial); *In re Lord*, 123 Wn.2d 296, 307, 868 P.2d 835 (1994) ("Prejudice to the defendant [from violation of right to be present] will not simply be presumed."); *Helminski v. Ayerst Labs.*, 766 F.2d 208, 218 (6th Cir. 1985) (harmless error where a product liability plaintiff was excluded from the liability phase of the trial), *cert. denied*, 474 U.S. 981 (1985).[3]

2. Automatic reversal is limited to rare circumstances where assessment of prejudice is impossible

Courts have justified the drastic remedy of automatic reversal only in such rare circumstances where assessment of prejudice is impossible in

[3] NJP cites to *Carlisle v. County of Nassau*, 64 A.D.2d 15 (N.Y. App. Div. 1978), a 3-2 decision in which the majority held that exclusion of the wheel-chair-confined plaintiff from jury selection was prejudicial per se. *Carlisle*, 64 A.D.2d at 20. *But see id.* at 21 (Mollen, J., dissenting) (the error was not so egregious to constitute a reversible error, *id.* at 22-28 (Hawkins, J., dissenting) (same). To the extent *Carlisle* suggests a per se rule that a violation of a civil litigant's right to be present results in automatic reversal, it is inconsistent with the above precedent from the United States Supreme Court and this Court. In any event, this case is distinguishable. The effect of the jury's not observing the plaintiff at jury selection is not quantifiable, but a party claiming inadequate interpreter services can reasonably be expected to show prejudice.

the sense the error permeates the entire proceeding and no other remedy could cure it, as in the case of *total* denial of right to counsel or a biased judge. *See Fulminante*, 499 U.S. at 306-12; *In re Davis*, 152 Wn.2d 647, 674-75, 101 P.3d 1 (2004) ("presumptive prejudice rule" is "limited to the 'complete denial of counsel' and comparable circumstances"); *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (automatic reversal may be justified for "Sixth Amendment violations that pervade the entire proceeding"); *Owen*, 407 F.3d at 226 ("Only in cases where the deprivation of the right to counsel affected – and contaminated – the entire criminal proceeding is reversal automatic."). The harmless error rule is inapposite in such cases because of "the difficulty of assessing the effect of the error." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).[4]

Unlike the intangible nature of the error permeating the entire proceeding, the prejudicial effect of any inadequacy in the interpreter services for a recorded proceeding can be assessed by examining the transcript or later evidence of possible prejudice. In fact, courts regularly apply the prejudice requirement for a claim of due process error based on

[4] The Supreme Court has explained that the Court's prior description of the "trial error/structural defect" dichotomy – with the former, but not the latter, being subject to the harmless error analysis – is not an inflexible criterion but is based on the difficulty of assessing the prejudicial effect of the error. *Gonzalez-Lopez*, 548 U.S. at 149 n.4; *Rushen*, 464 U.S. at 119-20 ("The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred.").

inadequate interpreter services. *See Tejada-Mata v. INS*, 626 F.2d 721, 725-27 (9th Cir. 1980) (immigration judge's refusal to permit interpretation of government witness testimony against alien was abuse of discretion but harmless); *Kuqo v. Ashcroft*, 391 F.3d 856, 859 (7th Cir. 2004) ("A generalized claim of inaccurate translation, without a particularized showing of prejudice based on the record, is insufficient to sustain a due process claim."); *Gutierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) ("To make out a violation of due process as the result of an inadequate translation, Gutierrez must demonstrate that a better translation likely would have made a difference in the outcome.").[5]

Both precedent and sound policy require the claimants to show prejudice when they seek a remand based on a claim of inadequate interpreter services. There is no basis to justify automatic reversal here.[6]

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[5] NJP relies on a recusal case. NJP 6-7; *Sherman v. State*, 128 Wn.2d 164, 204-06, 905 P.2d 355 (1996) (taking the "safest course" to remand when the judge initiated an improper ex parte communications and "may have inadvertently obtained information critical to a central issue"). Once the neutrality of the decision maker is reasonably doubted, the error is not susceptible to prejudice assessment. In contrast, failure to provide full interpretation is susceptible to prejudice assessment.

[6] The amici primarily argue that the IAJs did not allow the claimants to use the Board-appointed interpreters for confidential attorney-client communications. As discussed below, this was not an abuse of discretion in the context of those hearings. However, even if the IAJs erred in not allowing interpretation of such communications, the claimants on appeal should be able to point out what input, if any, they could have provided with this additional interpretation service. A reviewing court could assess the prejudicial effect, if any. None of the claimants has pointed to any such prejudice. *See Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 681-82, 175 P.3d 1117 (2008).

3. None of the authorities cited by the amici requires automatic reversal in this case

The cases cited by the amici are factually distinct and do not require automatic reversal here. For example, some of the cases simply did not address prejudice, because error was egregious and prejudice was apparent.[7] Some cases either expressly found prejudice or rejected relief for absence of prejudice.[8] Some others did not involve a remand.[9]

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[7] *See Negron v. New York*, 434 F.2d 386 (2d Cir. 1970) (indigent defendant in a murder case was given only sporadic translation at trial where 12 of 14 state witnesses testified against him in English without an interpreter, including the investigator who testified Negron admitted killing, and the only interpreter, while not translating Spanish to English went home and remained there on-call); *Lizotte v. Johnson*, 777 N.Y.S.2d 580 (N.Y. Sup. Ct. 2004) (pro se foster care benefit claimant was not asked enough questions to develop her case, not shown the exhibits offered and admitted against her when the exhibits were the entire basis of the hearing officer's adverse decision, and not provided translation of the exhibits or discussions about them between the hearing officer and agency representative); *Santana v. Coughlin*, 457 N.Y.S.2d 944 (1982) (prisoner in a disciplinary proceeding was denied word-for-word translation of his testimony, given inaccurate translation, and not informed of his right to call witnesses); *Augustin v. Sava*, 735 F.2d 32 (E.D.N.Y. 1984) (pro se deportee was given "nonsensical" translation of his testimony with the "accuracy and scope of the hearing translation [being] subject to grave doubt"); *Payne v. Superior Ct.*, 553 P.2d 565 (Cal. 1976) (indigent prisoner sued for damages was denied access to his trial after his attorney withdrew and had a default judgment entered against him while in prison).

[8] *See Figueroa v. Doherty*, 707 N.E.2d 654 (Ill. Ct. App. 1999) ("egregiously prejudicial" circumstances warranted relief, where an interpreter for pro se claimant allowed only to summarize the claimant's testimony and to interpret the referee's "highly inaccurate" 1-sentence summary of the testimony of key adverse witness, when that testimony occupied seven pages out of the 15-page transcript of the entire hearing); *Strook v. Kedinger*, 766 N.W.2d 219 (Wis. Ct. App. 2009) (court's denial of a sign language interpreter for a pro se deaf civil trespass defendant "prejudicially affected" his right to a fair hearing, when the denial resulted in his inability to present his cross and counterclaims); *In re Doe*, 57 P.3d 447 (Hawaii 2002) (parents have right to interpreter in family court proceedings where their parental rights are "substantially affected," but relief was not warranted, because the mother failed to show "she was substantially prejudiced by the absence of an interpreter at some of the hearings").

[9] *See Yellen v. Baez*, 676 N.Y.S.2d 724 (N.Y. City Civ. Ct. 1997) (pro se tenants facing summary eviction may not be penalized with the deposit of rent for the two adjournments that occurred due to the unavailability of an interpreter); *Daoud v. Mohammad*, 952 A.2d 1091 (N.J. App. Div. 2008) (stating in dicta that the court's use of

NJP argues that the Industrial Insurance Act, RCW 51.52.115, requires automatic reversal here, claiming that the Board violated its rule. NJP 14. The cited statute provides in relevant part:

> If the [superior] court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; *otherwise it shall be reversed or modified.* In case of a modification or reversal the superior court shall refer the same to the department with an order directing it to proceed in accordance with the findings of the court . . . .

RCW 51.52.115 (emphasis added). This language does not address non-prejudicial error.[10] Instead, the Act adopts "practice in civil cases," RCW 51.52.140, which includes the requirement that an appellant show a prejudicial error, RCW 4.36.240. In any event, the Board did not violate its rule that permits an IAJ to appoint an interpreter. *See* WAC 263-12-097(1) (IAJ "may" appoint an interpreter).[11]

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the defendant's brother as his interpreter was improper, and so was its refusal to accept the rent from the defendant to preserve his right to a hearing); *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973) (criminal case; found no basis for relief).

The court in *State v. Natividad*, 526 P.2d 730 (Ariz. 1974), simply directed the trial court to find "the nature and severity of any language difficulty" of the defendant and determine whether he "was entitled to be informed of his right to an interpreter."

[10] Under NJP's interpretation, a reversal is required even for the most minor procedural, evidentiary, or other error by the Board. It is unlikely that the Legislature contemplated such an absurd result. *See Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003) ("We avoid readings of statutes that result in unlikely, absurd, or strained consequences."). The case relied on by NJP does not support its position. *See Deffenbaugh v. DSHS*, 53 Wn. App. 868, 770 P.2d 1084 (1989) (stating that agency review judge was bound by the agency rule but affirming the superior court decision that affirmed the agency decision).

[11] NJP cites a federal case involving a federal agency's failure to comply with its own rule. NJP 15; *Montilla v. INS*, 926 F.2d 162, 168-69 (2d Cir. 1991) (requiring automatic reversal when an immigration judge failed to follow INS rule in failing to

B. Neither RCW 2.43 nor Due Process Eliminates a Judge's Reasonable Discretion in the Use of Interpreters

An interpreter is appointed "to assist the [LEP] person throughout the proceedings." RCW 2.43.030(1). The amici appear to read this language to impose a rigid requirement that the interpreter translate *all* that transpires, on or off the record, at the courtroom. But this language does not preclude a judge's discretion in the use of interpreters.

In evaluating the trial court's "borrowing" of the defense interpreter during the examinations of a state witness, this Court adopted a flexible approach taken by the federal court under the Court Interpreters Act, 28 U.S.C. § 1827-28. *See Gonzales-Morales*, 138 Wn.2d at 382-85. This approach looks to the *purpose* of the interpreter statute – "whether the purposes of the Act were adequately met." *Id.* at 384 n.41 (citation omitted). So long as the statutory purpose is met, the appropriate use of interpreters is a matter within the sound discretion of the trial court. *Id.*

"The purpose of RCW 2.43 is to uphold the constitutional rights of non-English-speaking persons." *Gonzales-Morales*, 138 Wn.2d at 381. In a criminal case, defendant's rights include the Sixth Amendment right to

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determine whether the alien in a deportation case wished to exercise his right to counsel). But this case has no bearing here, because the Board is a state agency and did not violate its permissive rule. Further, the Ninth Circuit has rejected a formalistic approach and requires prejudice for reversal, if there is no clear denial of counsel, based on a violation of an INS rule requiring an immigration judge to notify the alien of right to counsel. *See United States v. Cerda-Pena*, 799 F.2d 1374, 1377-79 (9th Cir. 1986). The Ninth Circuit's approach is consistent with Washington's. *See* RCW 4.36.240 (requiring prejudice in civil cases); RCW 34.05.470(1)(d) (requiring substantial prejudice).

counsel. *Gonzales-Morales*, 138 Wn.2d at 378-79. In *Gonzales-Morales*, the defendant's "right to counsel was preserved and, consequently, there was no abuse of discretion by the trial court." *Id.* at 386.[12]

If *Gonzales-Morales* is applied here, the IAJ's duty is to provide a due process hearing challenging the agency decision. As long as such a hearing is provided, the purpose of the statute is met, and the use of the interpreter is a matter within the sound discretion of the trial court or, in this case, the IAJ. Here, as described below, the Board provided an interpreter to assist each claimant, and their due process rights were preserved. The Board heard testimony from each claimant and arguments from their counsel. The de novo hearings at the Board were fully consistent with due process. *See Karlen v. Dep't of Labor & Indus.*, 41 Wn.2d 301, 303-04, 249 P.2d 364 (1952) (Board evidentiary hearing satisfied due process).[13]

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[12] NJP claims the statutory requirement that a waiver of an interpreter be knowing and voluntary places the right to an interpreter "on par with constitutional rights meriting the highest protection." NJP 8 (citing RCW 2.43.060(1)(b)). NJP confuses the different nature of the right to an interpreter and the right to be secured by the interpreter. An interpreter is provided to secure LEP persons' constitutional rights, and the strict waiver provision is designed to protect the LEP persons' constitutional rights.

[13] NJP at 9-10 argues the rights protected by RCW 2.43 should be the same in civil and criminal cases and quotes this Court's statement that as long as "the defendant's ability to understand the proceedings and *communicate with counsel* is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the sound discretion of the district court." *Gonzales-Morales*, 138 Wn.2d at 382 (emphasis added). The statute is intended to *secure* LEP persons' rights; it does not create rights that do not exist.

NJP incorrectly states at 10-11 that a driver in a license revocation hearing has a right to counsel, citing *Flory v. Dep't of Motor Vehicles*, 84 Wn.2d 568, 527 P.2d 1318 (1974). *Flory* does not stand for such a proposition. A driver "has no right to counsel in

ACLU/WITS, however, claim that a failure to provide full interpretation is a "categorical due process violation." ACLU/WITS 8-9. But a claimant's due process rights are not so absolute. *See In re Stout*, 159 Wn.2d 357, 376, 150 P.3d 86 (2007) ("SVP detainee does not have a due process right to confront a live witness at a commitment trial, nor does he have a due process right to be present at a deposition."); *id.* at 381 (Madsen, J., concurring) ("due process right to be heard in a civil proceeding is not absolute"); *Kulas v. Flores*, 255 F.3d 780, 787 (9th Cir. 2001) (pro se plaintiff's right to be present "is entitled to less protection than a criminal defendant's").[14] For example, the right to be present does not extend to "sidebar conferences and in-chambers hearings" that

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a license revocation proceeding or action." *Ball v. Dep't of Licensing*, 113 Wn. App. 193, 197, 53 P.3d 58 (2002); *State v. Staeheli*, 102 Wn.2d 305, 309, 685 P.2d 591 (1984) ("Whatever the impact of the right to counsel in the criminal proceeding, this right cannot alter the driver's statutory obligations under the implied consent law."). Also, contrary to NJP's claim, *Goldberg* does not hold a welfare recipient has right to counsel. *See Goldberg v. Kelly*, 397 U.S. 254, 270, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) ("*We do not say that counsel must be provided* at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.").

[14] ACLU/WITS cite to several pre-*Mathews* cases. *See Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) (aeronautical engineer's right to confront and cross-examine witnesses violated when his security clearance was revoked based on reports not made available to him, and he was denied an opportunity to confront and question the persons whose statements were in the report or the investigators who took the statements); *Goldberg*, *supra* (welfare termination hearing should include right to confront and cross-examine); *Leonard's of Plainfield v. Dybas*, 31 A.2d 496 (N.J. 1943) (judge's entry into the jury room during deliberations and giving additional instructions without informing the parties violated the right to be present). The proper analysis in a civil case is the *Mathews* balancing test. *In re Stout*, 159 Wn.2d at 373 (distinguishing *Greene* and *Goldberg* as not analyzed under *Mathews*). In any event, these cases are not analogous and do not support the amici's claim that the claimants have absolute due process rights to confrontation, cross-examination, or presence in this case.

"involved only discussion between the court and counsel on matters of law." *In re Lord*, 123 Wn.2d at 306-07; *In re Woods*, 154 Wn.2d 400, 432-33, 114 P.3d 607 (2005) (defendant need not be present "when presence would be useless, or the benefit but a shadow").

The amici's categorical view of how to provide interpretation is inconsistent with due process, which is a flexible concept and allows for judicial discretion in the use of interpreters in the courtroom.

C. The Board Provided an Interpreter for Each Claimant, and the Claimants' Due Process Rights Were Preserved

The IAJs appointed an interpreter for each claimant in each of the seven cases at the Board expense. In all cases, except for Kustura's (described below), the appointed interpreters translated all the testimony and on-the-record statements throughout the hearings. *Ferenćak* TR; *Lukić* TR; *Mašić* TR; *Memišević* TR; *Meštrovac* TR; *Resulović* TR.[15]

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[15] This brief refers to the certified appeals board record and hearing transcript in each of the seven consolidated cases by abbreviated case name followed by either BR (record) or TR (transcript) with the date of the proceeding, and the page number. The transcript in each case is located in the certified appeals board record for each case.

Ferenćak and *Meštrovac* involved only the wage computation issues, and *Mašić* and *Resulović* only timeliness of their appeals. *Lukić* involved medical and vocational issues, upon which Lukić prevailed based on the evidence she presented (she was awarded the pension benefits she requested). *Lukić* BR 1-17. *Memišević* involved an appeal from a Department decision denying interpreter services for attorney-client communications during claim administration. *Memišević* BR 172. Lukić and Memišević also sought to litigate wage issues, which the Board declined to consider because they failed to timely appeal the wage orders. *Lukić* BR 16; *Memišević* BR 4-5.

Interpreter services at perpetuation depositions are not an issue preserved in this case. *Kustura*, 142 Wn. App. at 682 n.51; *Ferenćak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729, 175 P.3d 1109 (2008). However, perpetuation depositions are only permissive and a matter of the parties' convenience, and none of the claimants attended

The IAJs did not extend the interpreter services to confidential attorney-client communications during hearing breaks based on a concern of neutrality. *E.g., Meštrovac* CP 464 (IAJ Bradley in colloquy) ("The reason I am saying that I will instruct the interpreter not to interpret during breaks and when we are not on the record is because I believe it compromises the objectivity of the interpreter."). This decision is not unreasonable, given that the workers' compensation claimants have no right to counsel. *See In re Grove*, 127 Wn.2d at 238; *see also United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001) (distinguishing "proceedings" from "attorney-client communications" under Court Interpreters Act). Thus, a "judge is properly vested with some discretion in these matters." *Kustura* CP 40 (Downing, J., memorandum opinion).

The amici argue Lukić was denied a due process right to be present based on two instances of summary translation: (1) colloquy discussion among the IAJ and attorneys mostly for scheduling and issue identification, *Lukić* (04/24/03) 9-32; and (2) the IAJ's statement for Lukić, 38-40. NJP 3-4, 11; ACLU/WITS 5. Neither instance shows abuse of discretion, let alone a due process violation requiring a remand.

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any of the perpetuation depositions. *Mašić*, *Meštrovac*, and *Resulović* did not involve any perpetuation deposition. *Ferenćak*, *Lukić*, and *Memišević* involved a perpetuation deposition of their economic expert Moss jointly conducted by their attorney on the wage issues not even considered in *Lukić* and *Memišević*. *Lukić* also involved perpetuation depositions on the medical and vocational issues, on which Lukić prevailed.

As for the preliminary colloquy discussion, when Lukić's attorney stated that the discussion had not been interpreted, the IAJ quickly offered her attorney to use the interpreter to translate the discussion for Lukić:

> . . . if there's anything material that you would like to have explained to your client now about what we've been doing, I'll be happy to have the interpreter translate for you so you may do that.

IAJ (04/24/03) 29-30. Lukić's attorney did so. Owen (04/24/03) 32. As her attorney's explanation of the discussion reveals, the colloquy involved matters for which Lukić's presence is not constitutionally required.[16] *See In re Lord*, 123 Wn.2d at 306-07. This instance shows no impropriety.

Nor can the amici show any impropriety in the summary translation of the IAJ's words of encouragement to Lukić.[17] These

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[16] Lukić's counsel dictated to the interpreter as follows:

> Mr. Interpreter, would you please explain to my client that the proceeding that has been held here before now, we have been obtaining the Court's rulings on various matters related to the consolidation of the second appeal and setting new deadlines. Would you also explain to her that the Court has ruled that you may not interpret for her to speak with me or any other person except in the presence of the judge and the presence of opposing counsel and, therefore, we will not be able to confer with each other during this hearing process through you.

[17] The IAJ stated as follows – *Lukić* (04/24/03) 38-40):

> I'd like to make a statement. I understand that because the claimant disagrees with the orders that have been issued by the Department and that the claimant has the burden of proof in this matter that, therefore, these proceedings are somewhat adversarial in nature. However, I would like to explain that I think particularly when we have people who are from a foreign country who do not necessarily understand our proceedings and maybe why they're here today might feel especially uncomfortable if this is their first experience being before the Board or any other administrative or judicial agency in this country. And I

instances present no due process concern. In any event, Lukić prevailed at the Board and was awarded the pension benefits she requested. The only other issue was the timeliness of her appeal from the wage order, and she received full translation at the hearing.[18]

D. Kustura Shows No Prejudice to Justify a Remand

In *Kustura*, the IAJ provided an interpreter only for Kustura's testimony. He did not receive interpretation of the other witness testimony. However, as explained in the Department's answer to ACLU at the Court of Appeals in *Kustura*, at 9-20, this limitation did not violate Kustura's due process rights, particularly because he showed no prejudice.

Kustura involved only the wage computation issues and raised mostly *legal* issues as to what employer contributions can qualify as "wages" for time-loss wage replacement benefits under RCW 51.08.178. *Kustura* BR 303; Amended Br. of App. 30-39. Kustura brought his own

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> would encourage the parties to attempt to reduce the amount of adversarial element to these proceedings to the extent that that is possible so that individuals who are here testifying before the Board understand that they are here basically to provide information that is helpful to assist the Board in making a decision.

[18] NJP also refers to a colloquy discussion at a pre-hearing conference, where there was no indication Lukić was present. NJP 3; *Lukić* (02/12/03) 13. Lukić did not request an interpreter for this conference; nor did she indicate she would be participating. At this conference, her attorney requested an interpreter for the hearing. *Lukić* (02/12/03) 11. At the hearing, the judge provided an interpreter for all the testimony and on-the-record statements. There is no abuse of discretion or prejudice requiring a remand.

ACLU/WITS claim, referring to the claimants' assertion in their supplemental brief (at 8), that due to the lack of word-for-word interpretation during the colloquy, one of Lukić's witnesses refused to return for a second hearing. ACLU/WITS 5. There is no basis in the record to support this assertion.

interpreter to the hearing and was permitted to have him present, although the IAJ used the Board-arranged one for official translation. TR (09/18/02) 4-5.[19] After his testimony, Kustura left with his interpreter. Owen (09/18/02) 39 ("May this witness and the translators be excused?").

The other witnesses testified about the employer costs for certain benefits, but Kustura did not testify as to the amount of any of such benefits.[20] Kustura argued his wages should include his cost of replacing his lost healthcare benefits, as opposed to what the employer actually paid for the benefits at the time of his injury. Owen (01/14/03) 7 ("Mr. Kustura presented the evidence of what it would cost him to replace the lost benefits."). The Board rejected his *legal* position and made findings based on the testimony given by Kustura's own expert Moss, finding no conflict in the testimony. *Kustura* (09/18/02) 65; BR 2, 19 (FF 8).[21]

On appeal, Kustura made no claim that the transcript was inaccurate or incomplete on the wage issues due to the lack of interpreter

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[19] The record does not support the claim that the judge prevented Kustura from using his interpreter. In fact, during Kustura's testimony, his attorney asked to speak with his interpreter, and the IAJ granted this request and ordered a recess. *Kustura* TR (09/18/02) 31-32. The assistant attorney general present at the hearing later stated in her response to Kustura's petition for review at the Board that there was no ruling preventing Kustura from using his interpreter during the hearing. *Kustura* BR 171.

[20] On one factual dispute about whether Kustura had a dependent child, the Board ruled in his favor based on his testimony. *Kustura* BR 19 (Finding of Fact 4).

[21] After the hearing, Kustura moved to re-open the case, claiming his employer's testimony about what it paid for his health and welfare benefits was incorrect. Owen (01/14/03) 7. The Board ultimately allowed Kustura to present additional evidence. BR 155-61. But he chose to present the testimony on the *trust-paid*, not employer-paid, healthcare. Fisher (12/29/03) 5-6. Kustura simply lost on his legal argument.

services. Rather, he simply argued, based on the record, that the value of the premium, not what the employer actually paid for it, should be included. *Kustura* Amended Br. of App. 30-31; Reply Br. 7-8. Under these facts, the Court of Appeals correctly concluded that any error in the Board's provision of interpreter services does not warrant a remand.[22]

III. CONCLUSION

The amici invoke broad policy arguments without regard to the facts in this case. As shown above, their arguments go beyond the requirements of due process and RCW 2.43. The Legislature has determined that only indigent LEP persons are entitled to a publicly-funded interpreter in non-government-initiated legal proceedings. *See* RCW 2.43.040(3). The Legislature has determined that only a prejudicial error justifies a new hearing. *See* RCW 4.36.240.[23]

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[22] NJP misplaces reliance on *Lenca v. Employment Sec. Dep't*, 148 Wn. App. 565, 200 P.3d 281 (2009). NJP 11-12. *Lenca* involved a pro se unemployment benefit claimant who had to leave the hearing for a job interview after he testified on the issue of whether he suffered a 25% pay cut (good cause to quit). In his absence, his employer gave contradicting testimony on this issue; the administrative law judge found for the employer; and upon Lenca's petition, the employment security commissioner refused to consider his "highly probative and critically necessary" pay stubs that would negate the employer's testimony. *Lenca*, 148 Wn. App. at 571-78. The commissioner abused discretion in refusing to consider Lenca's evidence. *Id.* at 578. Lenca showed prejudice by presenting evidence that would change the outcome; Kustura did not.

[23] NJP argues failure to provide full interpretation violates Title VI. NJP 13-14. As the Department explained in its answer to NJP at the Court of Appeals, at 12-13, 16-17, the Unites States Supreme Court has authoritatively read Title VI to only prohibit intentional discrimination and not confer any "private right" to "the individuals who will ultimately benefit from Title VI's protection" to enforce disparate impact regulations. *Alexander v. Sandoval*, 532 U.S. 275, 289-93, 121 S. Ct. 1511, 149 L. Ed.2d 517 (2001).

Thus, for the reasons stated in this and its previously-filed briefs, the Department asks the Court to affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 7th day of October, 2009.

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No. 81478-8-I consolidated with Nos. 81480-5, 81481-3, 81759-6, 81758-8

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, ET AL, Petitioners, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE OF DEPARTMENT'S ANSWER TO AMICI NJP, ACLU, & WITS

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused copies of the **Department's Answer to Amici NJP, ACLU, & WITS** attached and this **Certificate of Service** to be served and delivered to the parties of record as follows:

BY US MAIL postage prepaid:
(this party did not agree to service by e-mail).

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Subject: Kustura et al. v. Department of Labor & Industries, No. 81478-3

Dear Clerk,

Attached for filing is the Department of Labor & Industries (1) Answer to Amici NJP, ACLU, & WITS and (2) Certificate of Service in *Kustura et al. v. Department of Labor & Industries*, No. 81478-3.

<<Answer_NJP_ACLU_WITS.pdf>> <<Certificate_Of_Service.pdf>>

The Petitioners' counsel is receiving this email as courtesy, with the paper copies being delivered to her under applicable rules.

Sincerely,

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